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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Marco Ochoa-Gonzalez,
Plaintiff,

v.

United States Immigration and Customs
Enforcement, et al.,
Defendants.

No. CV 16-00363-PHX-DGC (DMF)

ORDER

Plaintiff Marco Ochoa-Gonzalez, who is currently confined in the Rivers Correctional Institution in Winton, North Carolina, brought this civil rights action pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). (Doc. 18.) Defendant Sardinias has filed a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), claiming that Plaintiff's claim against him is barred by the applicable statute of limitations. (Doc. 39.) Plaintiff was informed of his rights and obligations to respond, and he opposes the Motion. (Docs. 40, 44.) The Court will grant the Motion to Dismiss and terminate this action.

I. Background

Plaintiff's original Complaint was filed on February 3, 2016.¹ (Doc. 1.) On screening pursuant to 28 U.S.C. § 1915A(a), the Court determined that Plaintiff stated a

¹ Although Plaintiff's original Complaint was actually filed in this Court on February 8, 2016, Plaintiff signed and dated it on February 3, 2016. Under the prison mailbox rule, a legal document is deemed "filed" when handed by the prisoner to a prison

1 claim against Defendant Barbara Brown, an officer with the Drug Enforcement
2 Administration (DEA), and an unnamed agent of United States Immigration and Customs
3 Enforcement (ICE).² (Doc. 7 at 4.) On August 15, 2016, Plaintiff filed his First
4 Amended Complaint (FAC), which was nearly identical to the original Complaint, but
5 substituted Barbara Hopkins for Barbara Brown.³ (Doc. 18.) On January 17, 2017,
6 Plaintiff moved to substitute Eugenio Sardinas for the unknown ICE agent. (Doc. 33.)
7 The Court granted the motion, allowed the substitution of Sardinas, and ordered Sardinas
8 to answer the FAC. (Doc. 36.)

9 In his FAC, Plaintiff asserts one count of excessive force by an officer and alleges
10 that on January 24, 2014, officers of ICE and the DEA used excessive force while he was
11 under arrest. (Doc. 18 at 3.) Plaintiff claims that after he was arrested, his hands and feet
12 were cuffed and he was placed in a van. (*Id.*) While in the van, Plaintiff needed to use
13 the restroom and exited the van. (*Id.*) When he exited the van, “they” started beating
14 him, he went down, and “they” kicked him all over his body until they saw Plaintiff was
15 bleeding and not moving. (*Id.*) Plaintiff did not try to hit back or run. (*Id.*) Plaintiff has
16 suffered pain ever since and is confined to a wheelchair due to the incident. (*Id.*)

17 **II. Motion to Dismiss Legal Standard**

18 A Rule 12(b)(6) motion tests the legal sufficiency of a claim. *Navarro v. Block*,
19 250 F.3d 729, 732 (9th Cir. 2001). In deciding a Rule 12(b)(6) motion, the court takes all
20 allegations of material fact as true and construes them in the light most favorable to the

21
22 official for mailing, and that date is determined by the date the prisoner signs the
23 document rather the date it is filed with the clerk of court. *See Douglas v. Noelle*, 567
24 F.3d 1103, 1107 (9th Cir. 2009) (applying the prison mailbox rule articulated in *Houston*
25 *v. Lack*, 487 U.S. 266, 270–71 (1988), to § 1983 lawsuits by pro se prisoners). Therefore,
February 3, 2016 is the date Plaintiff’s Complaint was filed.

26 ² The Court directed service on Brown, but not on the unnamed ICE agent, and
27 permitted Plaintiff to use the discovery process to obtain the ICE agent’s name and to
amend his Complaint to name the agent. (Doc. 7 at 4.)

28 ³ Hopkins was subsequently dismissed from this action based on statute of
limitation grounds. (Doc. 41.)

1 nonmoving party. *Marcus v. Holder*, 574 F.3d 1182, 1184 (9th Cir. 2009). The court
2 will “‘presume that general allegations embrace those specific facts that are necessary to
3 support the claim.’” *Nat’l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 256 (1994)
4 (quotation omitted). Where the plaintiff is a pro se prisoner, the court must construe the
5 pleadings liberally and afford the petitioner the benefit of any doubt. *Hebbe v. Pliler*, 627
6 F.3d 338, 342 (9th Cir. 2010).

7 When the statute of limitations forms the basis of a motion to dismiss for failure to
8 state a claim, the motion can be granted if the running of the statute is apparent on the
9 face of the complaint, and “the assertions of the complaint, read with the required
10 liberality, would not permit the plaintiff to prove that the statute was tolled.” *Jablon v.*
11 *Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980); *see also TwoRivers v. Lewis*, 174
12 F.3d 987, 991 (9th Cir. 1999). Although courts will not normally look beyond the
13 pleadings in resolving a Rule 12(b)(6) motion, *Lee v. City of Los Angeles*, 250 F.3d 668,
14 688 (9th Cir.2001), a “court may consider material that the plaintiff properly submitted as
15 part of the complaint or, even if not physically attached to the complaint, material that is
16 not contended to be inauthentic and that is necessarily relied upon by the plaintiff’s
17 complaint.” *Id.* The court may also consider matters of public record, including
18 pleadings, orders, and other papers filed with the court. *Mack v. S. Bay Beer Distrib.*,
19 798 F.2d 1279, 1282 (9th Cir.1986), *abrogated on other grounds by Astoria Fed. Savings*
20 *and Loan Ass’n v. Solimino*, 501 U.S. 104 (1991).

21 The forum state’s personal injury statute of limitations and any tolling provisions
22 applies to *Bivens* claims. *See Van Strum v. Lawn*, 940 F.2d 406, 410 (9th Cir. 1991);
23 *Papa v. United States*, 281 F.3d 1004, 1009 (9th Cir. 2002); *Butler v. Nat’l Cmty.*
24 *Renaissance of Cal.*, 766 F.3d 1191, 1198 (9th Cir. 2014). In Arizona, the forum state in
25 this case, the statute of limitations for personal injury claims is two years. A.R.S. § 12-
26 542; *Marks v. Parra*, 785 F.2d 1419, 1420 (9th Cir. 1986). The statute of limitations may
27 be tolled if a plaintiff is prevented from filing an action “due to sufficiently inequitable
28 circumstances” or “extraordinary circumstances beyond plaintiffs’ control.” *McCloud v.*

1 *Ariz. Dep't of Pub. Safety*, 170 P.3d 691, 696 (Ariz. Ct. App. 2007) (internal citations and
2 quotations omitted). Federal law determines when a *Bivens* claim accrues. *Papa*, 281
3 F.3d at 1009 (citation omitted). Such a claim accrues “when the plaintiff knows or has
4 reason to know of the injury that is the basis of the cause of action.” *Douglas v. Noelle*,
5 567 F.3d 1103, 1109 (9th Cir. 2009).

6 **III. Discussion**

7 Defendant Sardinias argues that Plaintiff’s claim accrued on January 24, 2014 and
8 expired on January 24, 2016 – before Plaintiff filed his original Complaint. (Doc. 39 at
9 4.) Plaintiff did not name Sardinias as a Defendant until October 14, 2016, and Sardinias
10 contends that even if the Court found that Plaintiff’s amended claim naming Sardinias
11 relates back to the original Complaint, the claim would still be barred because Plaintiff
12 did not file his original Complaint until February 3, 2016. (*Id.*)

13 Plaintiff argues in his Response that the statute of limitations should be tolled.
14 (Doc.44 at 2.) Plaintiff asks the Court to consider that (1) he does not write or speak
15 English and has had to depend on help from others, (2) he is not versed in the law, (3) his
16 court-appointed attorney did not properly assist him in his criminal proceedings, and
17 (4) he no longer has legal assistance and is not capable of making intelligent and knowing
18 decisions. (*Id.*) Plaintiff asserts that he is confined to a wheelchair “as [a] result of the
19 beat[ing] (police brutality and e[x]cess of force) inflicted by officer Sardinias and his
20 fellow co-workers (arresting officer).” (*Id.* at 3.)

21 Plaintiff claims that Sardinias was one of the officers who used excessive force
22 against him on January 24, 2014. (*See* Doc. 18 at 3.) Plaintiff knew or had reason to
23 know of his injuries on that date and he has not presented any evidence that he did not
24 become aware of his injuries until some later date. *See Cabrera v. City of Huntington*
25 *Park*, 159 F.3d 374, 380-81 (9th Cir. 1998) (finding that Plaintiff had reason to know of
26 the injury on an excessive force claim on the day the excessive force occurred).
27 Therefore, under Arizona’s two-year statute of limitations for personal injury claims, and
28 absent tolling, Plaintiff was required to file his original complaint by January 24, 2016.

1 Plaintiff asserts a variety of potential impediments to filing a complaint, but he
2 does not show how any of those potential impediments prevented him from filing a
3 complaint for more than two years after he knew of the alleged use of excessive force. If
4 someone with English proficiency was required to help with his Complaint, Plaintiff does
5 not say that he could not obtain such help until after the expiration of the limitations
6 period. Lack of legal sophistication is not an “extraordinary circumstance” warranting
7 tolling of a limitations period. *See Raspberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir.
8 2006) (holding that “a pro se petitioner’s lack of legal sophistication is not, by itself, an
9 extraordinary circumstance warranting equitable tolling”). And Plaintiff does not explain
10 how the alleged ineffective assistance of his criminal defense attorney affected this civil
11 case.

12 Plaintiff signed his original Complaint on February 3, 2016, which is after the
13 January 24, 2016 deadline for filing his complaint. Plaintiff’s excessive force claim
14 against Sardinas is therefore barred by the statute of limitations.

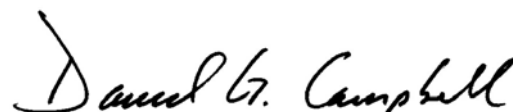
15 **IT IS ORDERED:**

16 (1) The reference to the Magistrate Judge is **withdrawn** as to Defendant
17 Sardinas’s Motion to Dismiss (Doc. 39).

18 (2) Defendant Sardinas’s Motion to Dismiss (Doc. 39) is **granted**, and
19 Defendant Sardinas is **dismissed with prejudice**.

20 (3) This action is **dismissed with prejudice**. The Clerk of Court must enter
21 judgment accordingly.

22 Dated this 2nd day of November, 2017.

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26 _____
27 David G. Campbell
28 United States District Judge